Supreme Court, U.S.
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NO. 98-16

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

SHELBY BAUCUM,

Petitioner,

v.

ROBYN SANDERS, CYNTHIA MULLANIX
AND CASA VIEW BAPTIST CHURCH

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS ROBYN SANDERS AND CYNTHIA MULLANIX BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Petitioner has mischaracterized the Question Presented to the extent he alleges that the tort of clergy malpractice is at issue here and to the extent that he presumes that Respondents' counseling relationships with Petitioner involved an "inseparable mixture of spiritual and secular counseling." Respondents submit that the following more accurately states the question presented to the Court:

Whether the Free Exercise Clause of the First Amendment to the United States Constitution provides absolute tort immunity to ministers for secular misconduct which arises from counseling relationships which are not purely secular in nature?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On January 25, 1996, a jury sitting in the U.S. District Court for the Northern District of Texas rendered a verdict in favor of Respondents Cynthia Mullanix and Robyn Sanders and against Petitioner Shelby Baucum, a Minister employed by Respondent Casa View Baptist Church, on claims of professional malpractice and breach of fiduciary duties. The standards of care and fiduciary duties which the jury was instructed to consider were those applicable to secular marital and mental health counselors. The jury was required to and did find that Baucum had the actual or proclaimed skill of a reasonably prudent secular marital or mental health counselor and had engaged in counseling with Respondents which was "essentially secular marital or mental health counseling in nature." (App. 23a, 25a-26a).

In denying Baucum's post-trial motions, the District Court found substantial evidence to support a finding that Respondents' counseling relationships with Baucum were essentially secular in nature.[1] (App. 23a-25a).

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[1] To the extent the Petition alleges otherwise, it is misleading because it does not cite all of the relevant testimony and, indeed, ignores all of the testimony relied upon by the District Court.

The Fifth Circuit Court of Appeals affirmed. The Court found that the jury's verdict was based upon secular standards and duties, not religious doctrine, and was thus not tantamount to a finding of "clergy malpractice." (App. 4a-5a)

The Court of Appeals also held that to invoke the protection of the Free Exercise Clause, Baucum was required to "assert that the specific conduct allegedly constituting a breach of his professional and fiduciary duties was rooted in religious belief." The Court thus did not address the nature of the underlying counseling relationships. The Court opined that "by instructing the jury to consider whether Baucum's counseling, rather than his alleged misconduct, was "essentially secular" in nature, the district court provided more than adequate protection under the Free Exercise Clause. Since Baucum did not allege that any of the specific misconduct shown by the evidence was rooted in religious belief,[2] his First Amendment defense was rejected. (App. 4a-9a)

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[2] Respondents' malpractice evidence showed that, as their counselor, Baucum failed to refer them to another counselor, expressed love and affection toward them, failed to redirect their attention back to counseling when they expressed love and affection for him, initiated sexual relations with them, and threatened them. (App. 37a, n. 10) Respondents' evidence showed that Baucum breached his fiduciary duties as a counselor by initiating sexual relationships with them and disclosing confidences shared in counseling. (App. 38a)

REASONS FOR DENYING WRIT

This Court has already formulated the principles by which First Amendment challenges are governed. The Court has said that the Free Exercise Clause protects only conduct rooted in religious belief. *Smith v. Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877-79 (1990); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 713 (1981). Secular conduct is not protected. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

This Court has also rejected the notion of absolute immunity for religious conduct. The protection afforded by the Free Exercise Clause is only against governmental action which purports to regulate religious conduct because of its religious motivation. *Smith*, 494 U.S. 878-79. The protection of the Free Exercise Clause does not extend to valid and neutral laws of general application. This Court has held that since such laws do not have as their specific object the regulation of religious conduct, they can be enforced to proscribe (or prescribe) conduct which one's religion prescribes (or proscribes) without offending the First Amendment. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993); *Smith*, 494 U.S. 872.

Baucum's argument that he and other ministers enjoy absolute tort immunity for secular misconduct which arises from counseling relationships which are not purely secular in nature is contrary to these established principles. The reasons

advanced by Baucum for granting his Petition for Writ largely ignore this conflict and do not otherwise show how the Court of Appeals' decision below incorrectly followed this Court's First Amendment jurisprudence. Likewise, Baucum does not show how dicta in *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994), which the Court of Appeals readily distinguished from the facts of this case, presents a conflict amongst the Courts of Appeal. In short, no reason has been advanced for this Court to reexamine the scope of protection afforded by the Free Exercise Clause in the context of this case.

CONCLUSION

For the reasons cited above, the Petition for Writ should be denied.

Respectfully submitted,

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